Struthers Wells Corporation *and* Office and Professional Employees International Union, Local 186, AFL-CIO. Case 6-CA-14011

July 21, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On February 2, 1982, Administrative Law Judge David L. Evans issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed limited exceptions and a brief in opposition to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge, as modified herein, and to adopt his recommended Order, as modified.

The General Counsel excepts to the Administrative Law Judge's failure to find that Respondent's refusal to pay a cost-of-living wage adjustment in January 1981 was a unilateral change in violation of Section 8(a)(5) and (1) of the Act. We find merit to this exception.

The relevant facts are largely not in dispute. On October 17, 1980,[2] at its first bargaining session Respondent presented its list of contract proposals and announced that it was not proposing to remove the cost-of-living escalator clause (herein called COLA) from the soon to expire collective-bargaining agreement.[3] Shortly after the sixth collective-bargaining session Respondent's employees engaged in a 2-day strike on November 5 and 6. Approximately 1 month after the strike and 3 weeks before the cost-of-living adjustment was due,[4] Respondent, by letter, announced that it was reassessing its practice of making the COLA, in view of the failure of the parties to reach a new collective-bargaining agreement. Respondent further stated that it intended to make a decision on the issue by December 19 and invited the Union to discuss this and other outstanding issues. In a reply letter dated December 16, Union Representative Porcaro notified Respondent that it considered the cost-of-living adjustment not to be a subject in dispute; that the parties had a tentative agreement as to its continuation; and that the Union had no intention of changing its opposition to any alteration of the cost-of-living adjustment. By letter dated January 7, 1981, Respondent advised the Union that, in the absence of any response from the Union, Respondent had decided not to make the cost-of-living adjustment because there was no assurance that the Union would honor the no-strike commitment in the expired contract. The letter went on to note that Respondent was not decreasing the wages of the unit employees but was refusing to increase wages of the group and thereby lose any "leverage it has to get a total agreement."

The Administrative Law Judge found that Respondent did not violate Section 8(a)(5) and (1) of the Act by refusing to pay the cost-of-living adjustment relying in part on *Meilman Food Industries, Inc.*, 234 NLRB 698 (1978). In that case, as here, the collective-bargaining agreement contained a cost-of-living clause. The clause in *Meilman* provided that, if the Consumer Price Index were at a certain level on May 15 or November 15 of any year during the life of the agreement, then a cost-of-living increase would be payable on the following July 1 or January 1. In *Meilman*, the agreement expired on December 6; therefore the Consumer Price Index determination of November 15 occurred before expiration. The Board found in those circumstances that Respondent's refusal to effectuate the increase on January 1 was a unilateral change in the existing wage structure in violation of Section 8(a)(5) and (1) of the Act. Here, the Administrative Law Judge notes that the agreement expired on November 1, before the November 15 Consumer Price Index determination, and on this ground alone finds that Respondent was not obligated to effectuate the increase. He concludes that to find otherwise would effectively be writing a contractual term to which the parties had not agreed the last time they signed a contract. We disagree.

The Board's discussion of the refusal to implement the adjustment in *Meilman* was addressed to the contention that the issue turned on contract interpretation and therefore should be deferred to arbitration. The Board found that the clause clearly set forth the preconditions for its implementation, those preconditions had been met, no contract interpretation was required, and deferral, therefore,

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] All dates herein are 1980 unless otherwise noted.

[3] That agreement was due to expire on November 1, 1980.

[4] The COLA in question was due in January 1981. It was to be based, as in past years, on the Consumer Price Index of the preceding November 15.

was not appropriate. Thus, the Board's finding of a violation was based upon the clear meaning of the clause and its application to the facts in that case. There is nothing in *Meilman* to suggest that a different result is required when the refusal to implement the COLA occurs after the expiration of the contract. Indeed, to so find would go against Board precedent concerning employer obligations after expiration of a collective-bargaining agreement.[5]

Here the cost-of-living adjustment was an existing term and condition of employment as established by the recently expired collective-bargaining agreement. It is axiomatic that such a condition of employment survives the expiration of a collective-bargaining agreement and cannot be altered without bargaining.[6] An employer is permitted to institute a unilateral change either where the union has waived bargaining on the issue or where the unilateral change is a result of a rejected company offer after impasse has been reached.[7] Otherwise, the employer has a duty to continue the terms of the expired collective-bargaining agreement.

Here, there is no contention nor is there any evidence that the Union waived its right to bargain with regard to the cost-of-living adjustment. Nor is there any evidence that the parties had reached impasse in December 1980. On the contrary, Respondent's bad-faith bargaining prevents any finding that impasse occurred.[8] Thus, the Administrative Law Judge found that, from the commencement of its bargaining, Respondent insisted upon certain proposals which by their nature served to frustrate collective bargaining. From these facts alone it is evident that Respondent was obligated to continue to implement the COLA as required by the expired agreement. Thus, we find that its failure to do so violated Section 8(a)(5) and (1) of the Act.

Moreover, after the strike occurred Respondent suddenly announced its intent to change its position on implementation of the COLA. Respondent stated that its reason for refusing to make the adjustment was to prevent loss of any "leverage it has to get a total agreement." In this regard, Respondent's action was analogous to the situation where an employer promises a wage increase to its employees effective at a later date but later unilaterally withholds it to use as leverage in collective bargaining. That such conduct violates Section 8(a)(5) of the Act is clear.[9] Accordingly, we find that Respondent's conduct in suddenly withholding the COLA to use it as leverage in bargaining also violated Section 8(a)(5) and (1) of the Act.

AMENDED REMEDY

Having found that Respondent violated Section 8(a)(5) of the Act by withholding the cost-of-living adjustment from the bargaining unit employees due on January 1, 1981, Respondent has deprived said unit employees of such wages and in order to make them whole we order that Respondent pay to all bargaining unit employees the cost-of-living wage increase due January 1, 1981, including interest thereon, and any such annual adjustments thereafter due, plus interest, until such time as a new agreement is negotiated with the Union, or until the parties have bargained in good faith to an impasse. Interest thereon is to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[10]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Struthers Wells Corporation, Warren, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 1(c) and reletter the subsequent paragraphs accordingly:

"(c) Refusing to bargain collectively with the Union by making any unilateral changes in wages, hours, or other terms and conditions of employment."

2. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs accordingly:

"(b) Upon request, bargain with the Union concerning any change in wages, hours, or other terms and conditions of employment and make whole all bargaining unit employees for cost-of-living adjustments, as provided in the section of the Board's Decision entitled 'Amended Remedy.'"

[5] See, e.g., *Bethlehem Steel Company (Shipbuilding Division)*, 136 NLRB 1500 (1962).

[6] Cf. *Harold W. Hinson, d/b/a Hen House Market No. 3*, 175 NLRB 596 (1969), enfd. 428 F.2d 133 (8th Cir. 1970).

[7] *Peerless Roofing Co., Ltd.*, 247 NLRB 500 (1980); *Allen W. Bird II, Receiver for Caravelle Boat Company, a Corporation, and Caravelle Boat Company*, 227 NLRB 1355 (1977); and *Royal Himel Distilling Company*, 203 NLRB 370 (1973).

[8] *Taft Broadcasting Co., WDAF AM-FM TV*, 163 NLRB 475, 478 (1967), enfd. *sub nom. American Federation of Television and Radio Artists, AFL-CIO* v. *N.L.R.B.*, 395 F.2d 622 (D.C. Cir. 1968).

[9] See *United Aircraft Corporation, Hamilton Standard Division (Boron Filament Plant)*, 199 NLRB 658 (1972), enfd. in pertinent part 490 F.2d 1105 (2d Cir. 1973).

[10] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT refuse to bargain collectively in good faith concerning rates of pay, wages, hours, and other terms and conditions of employment with Office and Professional Employees International Union, Local 186, AFL-CIO, as the exclusive bargaining representative of the employees in the appropriate unit:

All employees employed by Struthers Wells Corporation at its Warren, Pennsylvania facility in the job classification set forth in Exhibit "A" of the collective-bargaining agreement between Struthers Wells Corporation and Office and Professional Employees International Union, Local 186, AFL-CIO, effective from November 1, 1977 to November 1, 1980; excluding guards, professional employees and supervisors as defined in the Act, and all other employees.

WE WILL NOT fail to reinstate unfair labor practice strikers upon their unconditional application to return to work.

WE WILL NOT refuse to bargain collectively with the Union by making unilateral changes in wages, hours, or other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL, upon request, bargain in good faith with Office and Professional Employees International Union, Local 186, AFL-CIO, as the exclusive collective-bargaining representative of our employees in the appropriate bargaining unit with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL, upon request, bargain with the Union concerning any change in wages, hours, or other terms and conditions of employment and WE WILL make whole all bargaining unit employees for the cost-of-living adjustments due January 1, 1981, including interest thereon, and for any such annual adjustments thereafter due, plus interest, until such time as a new agreement is negotiated with the Union, or until the parties have bargained in good faith to impasse.

WE WILL offer the following named unfair labor practice strikers for whom the Union made unconditional application to return to work on or about November 7, 1980, immediate and full reinstatement to their former positions or, if such positions are no longer in existence, to substantially equivalent positions, discharging if necessary, any replacements, without prejudice to their seniority or other rights and privileges: Jeri Bleeck, Barbara Daley, Martin Menio, and Kathy Thompson.

WE WILL make the said employees whole for any loss of pay they have suffered as a result of our discrimination against them, with interest.

STRUTHERS WELLS CORPORATION

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge: This case was heard before me on July 21-23, 1981, in Warren, Pennsylvania. The complaint, as amended, alleges violations of the National Labor Relations Act, herein called the Act, by Struthers Wells Corporation (herein called Respondent). The complaint is based on charges filed by Office and Professional Employees International Union, Local 186, AFL-CIO (herein called the Charging Party or the Union). The original charge was filed on November 6, 1980.[1] On December 24 the General Counsel issued the original complaint alleging that "during the months of October and November 1980," in negotiations between Respondent and the Union which represents Respondent's office clerical employees in Warren, Pennsylvania, Respondent negotiated without intent to enter into a collective-bargaining agreement in violation of Section 8(a)(5). The complaint further alleges that in violation of Section 8(a)(3), on or about November 7, Respondent refused to reinstate four named employees when they made an unconditional offer to return to their former positions of employment from a strike caused by unfair labor practices of Respondent.[2]

On July 8, 1981, the General Counsel amended the complaint to allege that on or about December 19 Respondent "canceled the cost-of-living wage adjustment scheduled to be made in January 1981." Respondent filed

[1] All dates herein are in 1980 unless otherwise specified.

[2] Respondent's unopposed motion to correct the transcript is granted.

answers to the complaint admitting jurisdiction and the status of certain supervisors but denying the commission of any unfair labor practices.[3]

The General Counsel and Respondent have filed excellent briefs which have been carefully considered.

I. JURISDICTION

Respondent is a corporation with office and place of business in Warren, Pennsylvania, where it is engaged in the manufacture and nonretrail sale of equipment for the chemical, petroleum, and fertilizer industries. During the 12-month period ending November 30, Respondent, in the course and conduct of its business operations, purchased and received for use at its Warren facility goods and other materials valued in excess of $50,000 directly from suppliers located in points outside the State of Pennsylvania. Therefore, as it admits, Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, Respondent admits, and I find that the Union is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

Respondent has recognized and bargained with the Union as representative of its office clerical employees since 1950. Respondent also has, over the year, recognized and bargained with International Association of Machinists and Aerospace Workers (herein called the IAM) as the representative of its production and maintenance employees. It further has had a contractual relationship with International Federation of Professional and Technical Engineers, AFL-CIO, Local No. 55 (herein called the Technical Union), as the representative of its technical employees. The "technical unit" includes job titles of estimators, draftsmen, and reproduction and stock clerks.

The contracts between Respondent and the three unions representing its Warren employees expired in 1980. Respondent first negotiated with the IAM and then the Technical Union. After completion of those negotiations Respondent began negotiating with the Charging Party. The contract then in effect between Respondent and the Charging Party was negotiated in 1977 and effective from November of that year to November 1, 1980. (This agreement will be referred to herein as the "1977" or "prior" contract.) There were 10 negotiation sessions between the parties, the first of which was on October 17.

Meeting One—October 17

The Union was represented by: Staff Representative George Porcaro; Sandra Dickerson, president of the Local; Tom Wilkins, vice president; and Margaret Stino, the Union's secretary-treasurer. Respondent was represented by: attorney Robert D. Randolph; Mark Tracey, personnel manager; and Marie Whipple, assistant personnel manager. In all of these sessions Porcaro was the principal spokesman for the Union. Randolph was the principal spokesman for Respondent, as he had been in the 1980 negotiations with the IAM and the Technical Union.

At the first session the parties exchanged proposals for additions to the 1977 contract. In presenting Respondent's proposals, Randolph stated that he had "some good news and some bad news." The "good news" was that Respondent was not proposing to remove the cost-of-living escalator clause from the expiring agreement. The "bad news" was that Respondent had 17 pages of proposals on other matters.

The General Counsel contends that certain changes proposed by Respondent and its insistence upon them constitute evidence of bad-faith bargaining in violation of Section 8(a)(5). While there were other proposals made, the ones on which the General Counsel specifically relies are as follows:

Article I, section 4: The 1977 contract provided that: "No supervisor or non-unit member shall regularly perform any work normally or customarily assigned to employees covered by this collective-bargaining agreement." Respondent proposed to delete this section.

Article IV, section 2: In the 1977 contract this section provided that an aggrieved employee shall first discuss a grievance with his supervisor. The section further provided that, if a grievance involves a group of employees "transcending the jurisdiction of any one supervisor," it could be filed by the Union. Respondent proposed to delete this latter portion of this section.

Article X, section 1: This section incorporates as "Exhibit A" a ranking of jobs in the office clerical unit and their respective wage rates. In the 1977 contract there were 18 classifications, material coordinator being the highest and office person being the lowest. In Respondent's proposal for the new contract there were 11 positions and they were reranked as follows: Payroll clerk was moved from 6th to 1st; secretary/steno was moved from 7th to 2d; material coordinator was moved from 1st to 2d; chief labor control timekeeper was 2d; and labor control timekeeper was 3d, and, in Respondent's proposal of October 17, these positions were consolidated into one timekeeper position which was slotted 4th. Accounts payable clerk has been 10th and accounts receivable clerk was 9th, and in Respondent's 1980 proposal the positions were consolidated into the position of accounting clerk and ranked 5th. The office person had been 18th; in the 1980 proposal this job was rated 6th. Keypunch operator was moved from 13th to 7th; technical service specialist was moved from 12th to 8th; office specialist

[3] Respondent further answered that the allegations relating to its failure to pay a January 1981 cost-of-living increase to employees are barred by the limitations period of Sec. 10(b) of the Act and moves to dismiss the allegation. This motion is denied. The General Counsel has authority to investigate and issue complaint on subsequent occurrences which are reasonably related to an otherwise timely filed charge. *National Licorice Company* v. *N.L.R.B.*, 309 U.S. 350 (1940); *N.L.R.B.* v. *Fant Milling Co.*, 360 U.S. 301 (1959). As discussed *infra*, Respondent's decision not to pay the increase was a direct result of the failure of the parties to reach agreement during the bargaining which was the subject of the original charge.

was moved from 5th to 9th; clerk typist was moved from 13th to 10th; and receptionist was moved from 8th to 11th.

In all cases the entry level for each of these positions was reduced in pay; no wage increase was proposed for the first year of the 1980 contract; and 10-cent wage increases were proposed for each of the remaining years.

Article X, section 3: In the 1977 contract management was required to review employees' records twice each calendar year, in May and November, to determine which employees were entitled to merit increases within the rate ranges of their respective classifications. Respondent's proposal for the 1980 contract was: "On or before the first pay period in January of each year management, in its sole discretion, will decide which employees, if any, are entitled to merit or accelerated increases within the rate ranges of the respective classifications."

Article XII, the seniority: Respondent made several proposals to change this article. The probationary period, in which employees could be discharged or suspended without recourse to the grievance procedure, was increased from 3 to 18 months. In cases of layoffs, employees exercising seniority to "bump" junior employees would have to be able "to efficiently perform," rather than simply having "the ability to perform," the job into which the employee bumps. (As in the 1977 contract, the bumping employee would be given three working days to attain the level of proficiency required in the new classification.)

The 1977 contract provided that: "An employee replacing another employee in a lower classification pursuant to [this section] shall receive his regular rate, or the maximum rate of said lower classification, whichever is the lesser rate." For the 1980 contract Respondent proposed that: "An employee replacing another employee in a lower classification pursuant to [this section] shall receive the rate of the employee he replaces." Since the maximums and minimums of the various classification overlap, and since bumping is necessarily always downward, the effect of Respondent's proposals in this regard is that employees exercising bumping rights would possibly be placed at a lower wage rate than he or she would have been had the terms of the 1977 contract remained in effect on this issue.

Sections 7, 8, and 9 of the contract provided posting and bidding procedures to be followed when new jobs were created or when vacancies occurred in different classifications. Respondent's 1980 proposal provided for the deletion of these three sections.

Meeting Two—October 23

At this meeting the parties went through the Union's proposals, most of which were requests for increases in economic benefits including one for a 10-cent-per-hour wage increase for all 3 years of the 1980 contract. Porcaro testified that he was, and told Respondent he was, only seeking "parity" with what the IAM and the Technical Union had received in the preceding negotiations with Respondent.

Porcaro requested job descriptions of five employees whom Porcaro contended should be included in the bargaining unit. Randolph stated that he would get them to the Union the next day, which he did.[4]

Porcaro asked for delineation of Respondent's personal leave-of-absence policy; Randolph replied that he was not aware of one and would check into it. Randolph did at this meeting agree to proposals made by the Union for the timing of the announcements of Respondent's annual shutdowns, and certain provisions regarding maternity leave.

Meeting Three—October 24

The parties initially discussed the Union's contention that the new positions should be included in the bargaining unit and the Union's further request that language in the contract be included to cover personal leaves of absence. At that point Respondent offered General Counsel's Exhibit 7 proposing language to cover personal leaves of absence. The Union countered with a proposal regarding returns from leaves of absence and there was agreement on the topic at that point.

Then the Union went through the Company's proposal giving its position on the several sections and the reasons for these positions. Porcaro objected to the proposed deletion of article I, section 4, on the stated basis that removal of the section would take job security from the employees performing bargaining unit work. Porcaro objected to Respondent's article IV, section 2, proposal which, he argued, would have the effect of removing the right of the Union to file grievances. Porcaro stated that it would be an advantage for Respondent if the Union filed such "class grievances" in certain situations.

Porcaro objected to the failure of Respondent to include any wage increases for the first year of the new contract and Porcaro noted that the Union was well aware that the other two unions had received wage increases and stated, "[w]e certainly didn't feel that we were second class citizens and should be treated as that." Porcaro objected to the Company's proposal to change article X, section 3, to give Respondent a complete unilateral right to conduct or not conduct wage reviews and grant or not grant wage increases, and only on an annual (rather than semiannual) basis. Porcaro specifically objected on grounds that this area was the topic of a prior unfair labor practice charge.[5]

In regard to Respondent's proposal to modify the seniority provisions to the contract, Porcaro objected to the 18-month probationary period and noted that, even though he knew such an extensive period had been agreed to by the union representing the technical employees, entry positions such as file clerks in the office clerical unit could not be compared to the entry level in the technical unit. Porcaro further objected to the language which would require a bumping employee to "efficiently perform" the work required by the position into

[4] I discredit Porcaro's testimony that Randolph flatly stated that he did not have written job descriptions for the five individuals and would not even verbally state what their job duties were.

[5] In *Struthers Wells Corp.*, 245 NLRB 1170 (1979), enfd. 107 LRRM 2599 (3d. Cir. 1980), cert. denied 107 LRRM 2032 (1981), Respondent was found to have violated Sec. 8(a)(5) by failing to conduct October 1977 merit wage reviews thereby making a unilateral change in contractually established terms and conditions of employment.

which an employee bumped as this was a higher standard than that of the previous contracts. Porcaro asked Randolph what the purpose of the term "to efficiently perform" meant in regard to bumping rights. Randolph replied that the employees doing the bumping would have to "perform at the same level as someone going out." Porcaro objected to this, stating that the bumping employee may have been away from the job several years and the standard was "very subjective." Porcaro also objected to Respondent's proposal that a bumping employee had to take the wage rate of bumped employee in all instances because the bumping employee may well have had the job before and be entitled to the maximum in the rate range for a particular job while the bumped employee have been a new hire and at the bottom of the rate range.

Porcaro objected to Respondent's proposal to eliminate all bidding and posting procedures stating that the employees had been allowed to improve themselves in jobs within the bargaining unit through the utilization of these procedures. Porcaro further stated that the procedure had been in effect over a long period of time and the Union was not aware of any problems that Respondent had had with them.

Porcaro agreed to the Respondent's proposal regarding medical examination for employees returning from leaves of absence but stated that the Company should pay for such examinations. Randolph agreed at that time to such an amendment.

In regard to Respondent's proposal on Exhibit A (the rankings of jobs and the pay scale for each classification), Porcaro stated that, as well as affecting up to 15 employees, it would combine jobs such as accounts payable and accounts receivable clerks when the two positions entailed separate accounting functions. Porcaro specifically objected to reranking the receptionist to below a clerk typist because the receptionist had a far more demanding job. Porcaro stated that Respondent's reranking did not make sense and it would further harm the employees since they would suddenly find themselves in jobs ranked below those which they had bid, and worked, to get out of. As Porcaro put it, "the employees at the top would suddenly find themselves at the bottom with this new proposal." Porcaro further stated that, if the Respondent's motivation were economical, "the union would be willing to sit down and negotiate relief in economic portion insofar as starting pay, but it would have to be based on the existing structure; not taking the rights away from any of the employees."

In the afternoon of October 24, Respondent returned to the bargaining table with a revised Exhibit A which switched the switchboard/receptionist and the clerk typist in ranking but made no other changes. Porcaro asked that since Respondent was restructuring the jobs did it intend to provide cross-training and asked for job descriptions of the new positions. According to Porcaro, Randolph stated that Respondent would not cross-train employees and there were no job descriptions. Porcaro asked if Respondent would prepare job descriptions for the new positions; according to Porcaro, Randolph said that Respondent would not. Porcaro asked Randolph how Respondent expected the Union to entertain its proposals if they could not have the job descriptions upon which they were supposedly based. According to Porcaro, Randolph again replied that Respondent did not have job descriptions "and they did not have to give us that information."

Porcaro replied to the Company that the Union would therefore provide its own job descriptions for the jobs the employees then held.

According to Porcaro, Randolph responded to none of his objections stated above other than to agree that Respondent would pay for medical exams for employees returning from leaves of absence.

Randolph did not materially dispute any of Porcaro's testimony, and specifically did not deny that he made no response to the above Union's objections. Randolph acknowledged that Porcaro wanted job descriptions for all the newly created positions and further acknowledged that Respondent did not have them. Randolph testified that he told Porcaro that "in my experience from negotiations for a unit of 30, 35 employees, you usually don't need job descriptions because everyone knows what the people do and its no big problem. . . . In my experience there was no need in a unit this size for job descriptions." Randolph testified that Porcaro was "uncomfortable" with Respondent's position in this regard so Randolph told Porcaro that he would give the Union the names of all employees who would fit into the various new classifications. According to Randolph, Porcaro rejected this as an adequate response and stated that at the next meeting the Union would return "with descriptions of what the different people do."

Meeting Four—October 28

This meeting was attended by a Federal mediator. At the start of the meeting Randolph handed the Union "supplemental company proposals." These proposals contained the following provisions: Respondent proposed to add a provision for a *pro rata* grant of sick leave for employees on layoff. The supplemental proposal included changes in article XI, "social insurance benefits" which increased payments for disability, increased benefits in Respondent's comprehensive medical insurance plan, and increased maternity benefits. The supplemental proposal also provided for coverage of one's spouse in the medical insurance program when an employee retires.

Respondent's supplemental proposal also included amendments to its article XV proposed on October 24. Basically it provided for the placement of employees returning to work from leaves of absence and granted that an employee's seniority shall continue during the personal leave of absence. The Union agreed to these sections but objected to another provision that employees returning from leaves of absence to jobs other than those from which they took leave would receive the rate of the last regular incumbent in that job. Again, the Union objected to requiring an employee to take a rate which could be lower than which the employee may be entitled because of previous experience in that job.

The supplemental proposal provided, at article XVIII, sections 3 and 4, that Respondent would pay for the medical exams upon an employee's return from a leave

of absence as previously noted. Finally, the supplemental proposal, article XVIII, section 2, reduced an employee's probationary period from 18 months to 12.

After a break in the negotiation session and discussion with the mediator, Porcaro listed for the Company what the Union saw as the three major "stumbling blocks" to an agreement: (1) Respondent's proposal to delete article I, section 4; (2) its seniority proposals in their entirety; and (3) Respondent's restructuring and reranking the jobs listed on Exhibit A. Porcaro told Randolph other problems "would be washed away," if agreement could be reached in these areas and asked the Company to reconsider its position. The Union further gave Respondent the job descriptions of what the employees in the unit were doing at that time. After this presentation another break was taken.

Upon returning, the Union attempted to solicit from the Company what it had in mind for the jobs as restructured, especially those of the accounting employees. Randolph replied, according to Porcaro, "the people do what they do, and we know what people do, and that's how you will know what the jobs are." Randolph did not deny this testimony by Porcaro.

At one point in the afternoon, Porcaro and Randolph met with the mediator. According to the testimony of Randolph, which is undenied by Porcaro, Porcaro stated that the Union could "meet the Company part way" on some of its proposals if the Company would withdraw its proposal to delete article I, section 4, and its proposed modifications of the seniority provisions of the contract. According to Randolph, "my response was that we would not enter another agreement with the same language in those areas as was in the old agreement." Porcaro again objected to the phraseology "efficiently perform" in regard to the degree of skill a bumping employee would have to display in a new job. According to Porcaro, Randolph responded that the language "was their proposal and they had to have it." According to Randolph's credible testimony, the mediator concluded that conference by stating that there was no point in continuing that day and asked Randolph to come in the next day with his "final position."

Meeting Five—October 29

At the beginning of this meeting Respondent presented a plenary proposal entitled "Company's Final Position." The proposal was for a complete contract embodying all of Respondent's prior proposals except that the probationary period was reduced to 6 months from 12.

Respondent also presented job descriptions for the nine positions in the office clerical unit as it proposed to restructure them.

Porcaro responded that Respondent's proposals were an attempt to "break the Union" and that the Union had a ratification meeting scheduled, but he would present Respondent's final proposal to the membership with a recommendation that it be rejected. According to the credible testimony of Randolph, Porcaro also stated that a strike vote might be taken and Randolph replied that, if the strike were started, the insurance became the responsibility of the employees.[6]

Strike Vote Meeting—October 29

According to his credible testimony, Porcaro, on the evening of October 29, conducted a meeting of employees. In attendance were about 30 of the 35 employees in the bargaining unit. He presented Respondent's final proposal and recommended against acceptance, and the employees voted to reject the Respondent's proposal. Porcaro further proposed to the employees that they vote to authorize the calling of an unfair labor practice strike. Porcaro told the employees that Respondent was guilty of unfair labor practices in its course of bargaining for the 1980 contract and further recommended that the employees strike because of the failure of Respondent to remedy the unfair labor practices involved in the prior case which was then before the court of appeals on a petition for review.[7] A majority of the employees voted to engage in an unfair labor practice strike upon his recommendation. The strike was to be called at a time set by a strike committee composed of Porcaro and two employees.

Meeting Six—November 3

At this meeting the Union again brought up what it considered to be the "stumbling blocks" in the way of an agreement. The Union asked again for a reason for Respondent's proposal to delete article I, section 4. Randolph, according to Porcaro, stated that it was not Respondent's intent to have work done by nonbargaining unit employees, "but they were aware there [were] work overlap situations. There were people outside the bargaining unit that were currently doing bargaining unit work on the part of their duties, and they were concerned that the Union might file grievances."

Porcaro replied that Respondent was talking about a longstanding practice over which the Union had never filed grievances and it was unlikely that it would do so. At that point the Union proposed, in writing, an addition to the old article I, section 4, which stated that the Union recognized that there were then existing certain practices in which nonbargaining unit employees were doing bargaining unit work and the Union would not claim such activity to be a violation of the contract. Randolph then counterproposed to the Union the following written substitution for the old article I, section 4:

> It is recognized that the Union represents employees and not work, as such, and that there is overlap in the duties of bargaining unit and non-bargaining unit employees, which will continue to exist. By the signing of this agreement it is not the intent of the Company to substantially expand such areas of overlap.

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[6] Porcaro testified that at the October 29 meeting Randolph presented a letter dated November 3 detailing the cost of the continuation of insurance to employees who went on strike. Randolph credibly testified that the November 3 letter was delivered at the November 3 meeting and not before.

[7] See fn. 4.

Porcaro insisted that the Union "was certified to represent work, and that employees that were performing that work were really employees that were in the bargaining unit and that in essence this was even changing our recognition or certification."

Porcaro again offered to make language changes if Respondent would state its specific situations about which it was concerned, but, according to Porcaro, Randolph "took the position that they were not going to sign the agreement with that [the old] language in there."

None of the above testimony of Porcaro is materially disputed by Randolph.

The Strike

On November 5 and 6 the employees engaged in a strike, and, on the morning of November 7, through the Union, the employees unconditionally offered to return to work. The reinstatement problems which arose thereafter are discussed below.

Meeting Seven—November 12

On November 12, the parties both went to Respondent's premises for the purpose of negotiating but never met face to face for that purpose. According to Porcaro, the Union first met with the Federal mediator separately and appealed to him to ask Respondent for the reasons for its proposals. The mediator left the union party and returned several minutes later and reported that he was unable to secure from Respondent the basis for the "stumbling block" proposals. Further, according to Porcaro, at that point, he started walking out. Randolph appeared and attempted to hand him a further proposal. Porcaro told Randolph to mail it to him and kept walking.

According to Randolph, when the mediator approached the company committee, outside the hearing of the Union, he said that he wanted to explore some "conceptual ideas" with the Company. Randolph generally testified that he asked what the conceptual ideas were and the mediator did not have the answers Randolph needed. Randolph told the mediator that if the Union had some specific proposals to make it should put them in writing. Randolph also told the mediator that he had a written proposal to give the Union. The mediator left Respondent's committee members and returned stating that the Union was leaving the premises and that if Respondent had any proposal to give the Union it should hurry in and do so now. As did Porcaro, Randolph testified he attempted to hand Porcaro a proposal as he was leaving, but Porcaro refused to accept it.

At that point began a series of communications by letter, only parts of some of which are relevant negotiations rather than self-serving exercises in case-building.

By letter dated November 13, Randolph enclosed the proposal he had attempted to deliver to Porcaro on November 12. The first proposal was to revert to Respondent's November 3 proposal to delete article I, section 4. The second proposal was a change of article II, section I, which had provided for a union shop. The proposed modification of this provision was:

> Employees who are members of the Union in good standing on the effective date of this agreement, and those employees employed by the Company and coming under the jurisdiction of the Union who may thereafter become members of the Union, shall as a condition of employment maintain their membership in the Union by the tender of periodic views uniformly required by the Union as a condition of acquiring or obtaining membership in the Union.

Such provisions are commonly called "maintenance of membership" clauses.

On November 17, Porcaro wrote Randolph stating, *inter alia*, that the Union had no information as to the "purpose or intent" of Respondent's proposal to modify the proposal on article I, section 4. By letter dated November 20 Randolph responded to this and further stated a justification for his proposal for a "maintenance of membership" clause to wit:

> The purpose of the Company's proposed change in Article I, Section 4 that I forwarded to you on November 13 is quite obvious.
>
> When the Local 186 employees went on strike on November 5, the Company permanently replaced four of the striking employees. Under the circumstances, the Company does not feel that it is appropriate to enter into a collective-bargaining agreement that would require those four replacements to become dues-paying members of the union.

Four employees were replaced during the strike, the propriety of which will be discussed *infra*.

On December 9, by letter of that date, Randolph wrote Porcaro noting that under the expired collective-bargaining agreement cost-of-living increases had been made in January and July of each year. Randolph further stated that, in view of the failure to reach a new collective-bargaining agreement, Respondent was faced with a decision whether to continue the practice of making such cost-of-living adjustments. Randolph advised Porcaro that Respondent intended to make a decision on continuation of the cost-of-living adjustments on December 19 and invited discussions on that matter and all other issues outstanding between the parties. By letter of December 16, Porcaro replied:

> Cost-of-living was not a subject in dispute at the bargaining table. In absence of an overall agreement, the parties had a tentative agreement as to the continuation of the Cost-of-Living provision of the Agreement. The Union has no intention of changing its position in this regard, especially since other considerations were made in our negotiations based upon the agreed-to continuation of Cost-of-Living adjustments.

By letter of January 7, 1981, Randolph advised Porcaro:

> In the absence of any input from OPEIU, Struthers Wells' management decided that it would not be prudent to make cost-of-living adjustments for the

> Local 816 bargaining unit because there is no assurance that the Local 186 employees will honor the no-strike commitment in the expired contract.

Randolph's letter went on to note that Respondent was not decreasing the wages of the bargaining unit employees but simply refusing to increase wages of the group and thereby lose any "leverage it has to get a total agreement."

Other Bargaining Sessions

The parties met again on January 28, February 28, and June 10, 1981. While there were a few agreements reached on some peripheral issues, there were no significant changes of position by either of the parties. It is unnecessary to detail these meetings as the complaint alleges *only* that Respondent's conduct in negotiations during October and November was violative and at the hearing the General Counsel specifically disavowed any intent to make out a violation by the evidence adduced concerning these last three meetings:

> JUDGE EVANS: Then tell me why Paragraph[s] 12 and 13 are limited to the periods of October and November of 1980. I mean in the usual drafting I think where there's an allegation of continuing violation is: Since on or about and continuing to date. You don't do that. Why?
>
> What you're saying is they continued to bargain in bad faith, but why didn't you put that in your complaint?
>
> MR. MEYERS (for General Counsel): I think, your Honor, my initial statement is our basic position; that the evidence of these later meetings is relevant as reflecting on the Company's position in negotiations in the period mentioned in the complaint. And while not in itself a violation or alleged as a violation, it is relevant evidence on the Company's posture and state of mind, its bad faith during the October-November period.
>
> That is specifically alleged.
>
> JUDGE EVANS: Sort of the opposite of background. You're going to tell me what happened subsequently?
>
> MR. MEYERS: Yes.
>
> * * * * *
>
> MR. MCQUONE (for Respondent): I'm sorry. I don't mean to pursue it, but just for the record let me clarify, am I correct, the evidence is being heard for the purpose at the moment at least reflecting on the prior actions and not for the purpose of making out an independent violation?
>
> JUDGE EVANS: That's the way I understand it.
>
> MR. ZAWATSKI (for General Counsel): One second, your Honor.
>
> JUDGE EVANS: Very well.
>
> MR. MEYERS: That's the intent, your Honor. It's simply evidentiary with no intent to make out a violation.

Therefore, evidence of the sessions after November is relevant for proof only of the undisputed fact that there was no collective-bargaining agreement reached and that attempts at reaching such agreement ended on June 10, 1981.

Strike Replacement Questions

It is undisputed that, when the striking employees offered to return to work on November 7, four of them, Barbara Daley, Jeri Bleeck, Martin Menio, and Kathy Thompson, were informed by Respondent's personnel department that they had been permanently replaced and would not be reinstated to their former positions at that time, but would be placed on a preferential hiring list. The Union filed grievances on behalf of the employees stating that at least two of them, Daley and Bleeck, should be able to "bump" less senior employees under the provision of the expired contract. These grievances were denied by Respondent. The complaint alleges that all four employees were unfair labor practice strikers and could not lawfully be denied reinstatement on November 7, and that Respondent, having done so, violated Section 8(a)(3). Alternatively, the complaint alleges that Respondent unilaterally modified the employees' working conditions by refusing to afford Daley and Bleeck bumping rights, in violation of Section 8(a)(5).

B. *Concluding Findings*

Section 8(a)(5) of the Act establishes a duty "to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement." *N.L.R.B.* v. *Herman Sausage Company, Inc.*, 275 F.2d 299, 231 (5th Cir. 1960). As the Supreme Court stated in *N.L.R.B.* v. *Insurance Agents' International Union, AFL-CIO [Prudential Insurance Company of America]*, 361 U.S. 477, 485 (1960):

> Collective bargaining, then, is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of "take it or leave it"; it presupposes a desire to reach ultimate agreement, to enter into a collective-bargaining contract.

This obligation does not compel either party to agree to a proposal or make a concession. *N.L.R.B.* v. *American National Insurance Co.*, 343 U.S. 395 (1952); specifically, it does not compel agreement on particular contractual terms, no matter how strongly desired by a union. *N.L.R.B.* v. *H. K. Porter*, 397 U.S. 99 (1970). However, the Board may, and does, examine the contents of the proposals put forth, for, "if the Board is not to be blinded by empty talk and by the mere surface motions of collective bargaining, it must take some cognizance of the reasonableness of the position taken by an employer in course of bargaining negotiations." *N.L.R.B.* v. *Reed & Prince Manufacturing Company*, 205 F.2d 131, 134 (1st

Cir. 1953), cert. denied 346 U.S. 887. Specifically, as stated by the First Circuit at page 139 of its opinion, insistence upon proposals which do not have "the slightest chance of acceptance by a self-respecting union" is viewed by the Board and the courts as an indication that an employer is attempting to bargain without intent to reach agreement in violation of Section 8(a)(5).

The complaint alleges that Respondent: "proposed and insisted upon contract provisions relating to, *inter alia*, supervisors doing unit work, deletion of union security, reduced wage structure, changed evaluation procedures, increased probationary period, virtual elimination of 'bumping' rights and a removal of posting and bid rights" which existed in prior contracts between the parties. The complaint further alleges that in the same time period Respondent "proposed and insisted upon a contract provision which would eliminate the Union's right to initiate grievances." The General Counsel argues that Respondent's proposals in these areas were "predictably unacceptable" and that Respondent's insistence upon them, without meaningful concession, constitutes a failure to bargain in good faith in violation of Section 8(a)(5) of the Act.

Respondent replies that its proposals do not fall into the category of "predictably unacceptable" or those which no self-respecting union would accept. Respondent argues that it was seeking only concessions from the Union comparable to those made by the Technical Union in their 1980 negotiations and that it was not attempting to frustrate agreement. As stated in Respondent's brief, page 13:

> Respondent acknowledges that its proposals were designed to improve efficiency in the office clerical unit, but that was a price that office clerical unit had to pay in order to retain the cost-of-living escalator in the renewal contract . . . . Furthermore, the "sacrifices" proposed to the office clerical unit were comparable to the "sacrifices" that had heen negotiated earlier with the Technical Union.

Respondent further argues that, since the Union stated several times during negotiations that it was seeking "parity" with the economic benefits the Technical Union and the IAM had secured for their respective units, there cannot be said to be bad faith for it to have sought "parity" with the newly negotiated Technical Union contract.

With this case law and the respective positions of the parties in mind, the legal conclusions to be made are as follows.

Union Jurisdiction

Looking first at Respondent's initial proposal, it is to be noted that it proposes elimination of article I, section 4, the prohibition against any supervisor or other "non-unit member from regularly perform[ing] any work normally or customarily assigned to employees covered by this bargaining agreement." Of course, the immediate effect of Respondent's proposed deletion is not only to permit Respondent to utilize supervisors regularly to perform work customarily assigned to unit members, but also to permit Respondent to use anyone to do that work and do it "regularly." That is, the proposed deletion would allow Respondent to erode the bargaining unit completely by the assignment of any customary duties of the bargaining unit personnel to supervisors or employees not in the unit, or by contracting out of all of the unit work.

On November 3, the Union proposed to add to article I, section 4, language that acknowledges that certain overlap existed between the work of the clerical unit and the employees in other units. The Union further proposed language that would prevent it from grieving over such overlap as it had theretofore existed. At that, Respondent countered with its proposal that article I, section 4, still be deleted, but in its place was to be substituted the language that "the Union represents employees and not work," that the overlap would continue, and acknowledged only that it was then "not the intent of the company to substantially expand such areas of overlap."

The difference between Respondent's October 17 and November 3 proposals is essentially nonexistent. Like its predecessor, the November 3 proposal still would license Respondent to use any supervisor, employee, or nonemployee, at any time, to do "any work normally or customarily assigned to employees" who had been in the bargaining unit.[8]

When Porcaro attempted to solicit reasons for Respondent's demand to delete article I, section 4, the only answers from Randolph were that Respondent had to have it out for any future agreement, that Respondent wished to prevent grievances, and, by Randolph's letter of November 20, that the purpose "is quite obvious." The first answer was no reason for the proposal; it was the statement of objective. The second was equally specious; there had been only one grievance on this issue in 3 years; it was resolved before arbitration; and there is no evidence that the Union had done or said anything to indicate that it intended to file any other such grievances. In short, the reason was not "quite obvious," unless it was that Respondent wished to have the right to erode the unit by elimination of article I, section 4.

In *Columbia Tribune Publishing Co.*, 201 NLRB 538 (1973), the parties had for years had a contract defining the bargaining unit in detail by reciting job descriptions. The contract also contained the provision "(a)ll work within the jurisdiction of the Union shall be performed only by journeymen and apprentices." The employer insisted upon deletion of all of the jurisdiction-unit clauses on the grounds that modernization had compelled the need for more flexibility in assignments. The Board held that the effect of the employer's proposal would be to deny exclusive recognition of the union as the bargaining agent of the employees in the appropriate unit, and further held that insistence thereupon was indicative of bad faith. Here, the effect is the same; Respondent's proposed deletion of the jurisdictional clause would permit it to deny recognition of the Union as the representative of any employee doing "any work normally or customarily assigned to employees" in the appropriate unit. It would

[8] Even the November 3 proposal was withdrawn by Randolph's letter of November 13.

permit Respondent to recognize another of the two unions at Respondent's facility, or no union at all, as the representative of employees performing such work.

Respondent contends that there was no such jurisdictional clause in the newly negotiated Technical contract; therefore, it was simply asking for "parity" which was also a stated objective of the Union. First, it is to be noted that the "parity" sought by the Union was purely in the economic sphere. Second, it is to be noted that the Technical unit's prior (1977–80) contract had no such jurisdictional clause. Whether jurisdiction of the Technical Union could be eroded because of absence of such provision in the 1980–83 contract is a question which could be answered in different ways by different arbitrators. But, if there had been such a clause in the Technical Union's preceding contract, it is substantially more likely that an arbitrator would find that the deletion in the 1980–83 contract was a concession by the Union that Respondent had a new right to alter unilaterally the unit composition. Insistence upon such a right is insistence upon the privilege of withdrawing, partially or totally, recognition of the Union. As in *Columbia Tribune*, I find and conclude that such insistence constitutes evidence of an intent to frustrate, rather than facilitate, agreement.

Wages

In the 1977 contract, article X, section 3, merit reviews for increases within the wage rate range for each classification were called for semiannually. There was no express provision that the Union participate in such wage reviews. However, there was no express provision, as Respondent proposed for the 1980 contract, that the decision to grant increases or not was to be made by management "in its sole discretion." Despite objections from the Union, Respondent maintained its original position on this provision in October and November (and thereafter). The injection of the quoted phrase would have made it clear that the Union had waived the right of employees, or the Union, to grieve over withheld or reduced merit wage increases. Such agreement by the Union would, therefore, have been a waiver of its right of representation of the employees on the issue of merit wage increases during the term of the contract. Insistence by Respondent on such waiver was insistence on a right to deny recognition of the Union as the collective-bargaining representative of the employees, at least in the area of merit wage increases. As stated by the Board in *Smyth Manufacturing Company Inc.; Beacon Industries*, 247 NLRB 1139, 1166 (1980), of the Administrative Law Judge's Decision:

> It is one thing for the employer to take a position that merit raises may be a valuable managerial tool and that some discretion is in order, but to exclude the Union from total participation in that mechanism is clearly indicative of a desire to conduct business in a completely unfettered fashion. Nothing can be more important to the position of an employee than the receipt of wage increases. To demand that future wage increases be subject totally to the discretion of the employer precludes the union representational function from a most vital area.

Therefore Respondent's position is evidence of bad faith unless, as it contends, it was privileged to insist upon such a provision because the Technical Union had agreed to the same "sole discretion" language. I believe that it was not.

That a union or its affiliates have agreed with the same employer, or other employers, to certain concessions has been held by the Board and the courts to be a relevant consideration, but only where the units were essentially similar. Here, a different union and a different unit are involved. Assuming that the Technical Union has a modest degree of self-respect, it may have been willing to waive its bargaining rights for considerations not held by the employees in the clerical unit or the Union which represents them. That is, Respondent was not privileged to insist that the Union waive its statutory rights simply because one[9] other union, representing a dissimilar unit, had done so.

Therefore, I conclude that Respondent's proposal and subsequent insistence on the right to deny the Union any role in representing employees on the issue of merit wage reviews which were to be conducted is further evidence of its bad faith during the October and November session.[10]

Class Grievances

The General Counsel argues that evidence of bad faith is found in Respondent's insistence on the deletion of the provision in the prior contract, article IV, section 2 (sentence 2), that when a grievance involves employees under more than one supervisor the Union may file directly with the industrial relations manager (which is the third step of the grievance procedure) a grievance on behalf of all such employees. The General Counsel cites as his only authority *Latrobe Steel Company*, 244 NLRB 528, 533 (1979). In that case respondent insisted to impasse on a proposal which excluded the union from participation in the handling of all grievances until the latter stages of the grievance procedure were reached. The Board held that the position of the employer therein was tantamount to requiring the union to waive the employees' Section 9(a) rights to representation at all steps of the grievance procedure which put the proposal outside the Section 8(d) terms "wages, hours, and other terms and conditions of employment." The employer was therefore not privileged to make acceptance of its proposal a condition precedent to agreement. Accordingly, the Board found that the insistence to impasse on such a proposal was a violation of Section 8(a)(5).

Respondent answers, and I agree, that its proposal is distinguishable from the employer's in *Latrobe*. Under Respondent's proposed modification, the Union remained accessible to the employees at all stages of the grievance procedure; it was excluded from none. It would only

[9] Respondent does not contend that the IAM made a similar waiver of bargaining rights of the production and maintenance employees.

[10] This is not to say that Respondent's proposal to reduce the number of wage increases during the contract term was evidence of bad faith. There is no evidence that Respondent was motivated by anything other than economic considerations in its proposal to reduce the merit wage reviews from a semiannual to an annual basis. Respondent was seeking an economic concession only, and this is the essence of bargaining.

have lost the right to file "class" grievances directly at the third step. It could, as it had done under the prior contract, file grievances at the first step on behalf of any employee. While "class" grievances filed at the third step may have been expedient in some cases for the Union (and Respondent), the inability to file them in no way diminishes the representational status of the Union.

Therefore I find Respondent's position on this point not to be evidence of bad faith.

Posting and Bidding

It is not the law that, once a term or condition of employment is established by one contract, it must be included in all successive contracts and employees can only gain (or, at least, not lose) as contracts are renewed. But "take-away[11] proposals rigidly adhered to by employers must be carefully scrutinized because they can be, and are, an effective method of stultifying bargaining.

Smyth, supra, states flatly that nothing is more important to employees than wages. The scope of that most vital term of employment is not limited to the assignment of so much money for each classification during the term of a contract. The potential for advancement is part of the area of "wages" in any employment relationship. When the employees select a collective-bargaining representative they do so in part so that those who wish to excel (financially or professionally) do not have to depend solely on the unilateral appraisal of management. They wish to establish fair procedures which are participated in by their representative. The employees herein had sought and won those procedures, and the right to representation when invoking those procedures, in the past. Respondent proposed, and rigidly insisted upon, the right to make all such potential promotional opportunities subject to its unilateral actions by its demand that the established posting and bidding procedures be eliminated.

Precisely like its demand that it be permitted to set wage rates unilaterally, Respondent's demand for unilateral control of all promotional opportunities would divest the Union of its representational status in the most vital area of the employment relationship. Therefore, Respondent's insistence on the elimination of the bidding and posting procedures is evidence of bad faith.[12]

Other Seniority Proposals

General Counsel further alleges that there is evidence of Respondent's lack of good faith in its proposal and insistence upon provisions that require that in the event of a layoff employees bumping junior employees must be able to "efficiently" perform the work of the junior employee to be awarded that job and that the senior employees would assume the wage rate of the employee he replaces. Respondent admits that the utilization of the word "efficiently" sets a higher standard for employees exercising bumping rights, but denies that its position is evidence of bad faith. I agree. There is no law that an employer may not seek to raise the efficiency standards of its employees any more than there is a law that a union cannot attempt to raise the wage rates of those employees. Moreover, the proposal that the bumping employee take the wage rates of the bumped employee is, again, a purely economic proposal upon which Respondent had the right to insist. Accordingly, I reject the contention of the General Counsel in regard to these provisions.

The complaint alleges that Respondent's proposal and insistence upon a "reduced wage structure" and increased probationary period constitute further evidence of bad faith. While it is true there was a delay of 2 weeks in producing the job descriptions for the redesigned and reranked jobs in the unit, there was no contention that the descriptions finally submitted on October 29 by Randolph were inadequate. Therefore, the Union was given the information necessary to bargain about the wage structure. The Union disagreed with Respondent on the ranking of clerk typist over receptionist, and Respondent conceded on that point. There is no evidence that, had the Union made other objections to Respondent's ranking of the jobs, Respondent would not have entertained them. It cannot be said, therefore, that Respondent exercised bad faith in its proposal and insistence upon combining and reranking jobs in the unit and reducing the wage structure. Similarly, Respondent did bargain on the issue of increased probationary period. It reduced its original demand to increase the period from 18 months ultimately to 6 months. Respondent, therefore, did not exercise an unyielding attitude in this area, and it would be fallacious to state that Respondent had no right to seek any increased probationary period, especially since many of the jobs were, under Respondent's proposals, to be combined and probably would become more complex.

The Unfair Labor Practice Strike

On October 29, as he credibly testified, Porcaro conducted a meeting of almost all of Respondent's 35 clerical employees. He told the employees that Respondent was engaging in a course of bad-faith bargaining and that Respondent had not remedied its unfair labor practices previously found by the Board. As Porcaro further credibly testified, nearly all of the employees voted to strike at a time specified by the strike committee because of both cases of Respondent's unfair labor practices.

Respondent denies that the strike which ensued on November 5 and 6 was an unfair labor practice strike. I disagree. While Respondent did not engage in bad-faith bargaining on all counts alleged by the General Counsel, it is clear that, at least in the areas of wages, seniority, jurisdiction-unit, and elimination of posting and bidding, Respondent was engaging in a course of bargaining without intent to reach an agreement. As demonstrated by the record as a whole, this bargaining was a part of the reason that the employees struck on November 5 and 6. I further find that a part of the reason for the employees' strike of November 5 and 6 was to protest Respondent's failure to remedy the unfair labor practices found in the prior Board case. *Ricks Construction Company, Inc.*, 259 NLRB 295 (1981). Therefore, the strike of November 5

[11] See *Herman Sausage, supra.*

[12] Again, while the Technical Union agreed to such a deletion in its 1980 negotiations with Respondent, this affords Respondent no defense. The Technical Union is a different union representing a different unit, and the degree of self-respect it possesses cannot be determined by this record.

and 6 was an unfair labor practice strike and Respondent's failure to reinstate employees Jeri Bleeck, Martin Menio, Barbara Daley, and Kathy Thompson, upon their unconditional application for reinstatement after that strike was a violation of Section 8(a)(3) and (1) of the Act.[13]

Union Security

The determination that the strike herein was caused by Respondent's unfair labor practices is directly relevant to consideration of its position on union security. On November 13, Respondent proposed, and thereafter insisted upon, deletion of the union shop clause and substitution therefor a maintenance-of-membership clause. Assuming that Respondent took as a matter of philosophical principle the position that employees hired during the strike should not be compelled to join the Union, it cannot take advantage of its own unfair labor practices. The new employees were hired simply because Respondent failed to reinstate the unfair labor practice strikers as it had a duty to do. Having created the situation of "new employees" unlawfully, Respondent cannot take advantage of that situation and use it as a premise for extinguishing the existing union-security agreement that had existed between the parties for years. Moreover, assuming Respondent lawfully refused to reinstate the four striking employees involved herein, its proposed maintenance-of-membership clause covered all employees who may have elected to withdraw from membership after the expiration of the 1977 contract. Accordingly, it is clear that Respondent's stated basis for its position of maintenance of membership was disingenuous,[14] and its position was taken in bad faith.

Conclusion on Bargaining

Upon the entire record, I find and conclude that, while Respondent did bargain in good faith on some topics, by its overall course of conduct in negotiations Respondent did, in violation of Section 8(a)(5), fail to bargain in good faith with the Union concerning the terms and conditions of employment of employees in the unit described below. While I find that a part of the course of conduct was Respondent's refusal to bargain concerning union shop as well as a deletion of all bidding and posting procedures, this resolution of the issue in no way derogates the admonition of the Supreme Court in *H. K. Porter Co.* v. *N.L.R.B., supra*, to the effect that the existing statutory scheme prohibits compulsion by the Board or the courts over the actual terms of the collective-bargaining agreement. That is, Respondent is not required to agree to the reestablishment of the precise clauses which existed in the 1977 office clerical contract. The Act requires only a direction to Respondent that, upon request, it resume bargaining with the Union in a manner consistent with the requirements of Section 8(d) of the Act.

[13] *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).
[14] See *Smyth Manufacturing Company, supra.*

Cost-of-Living Adjustment

The General Counsel contends that the failure of Respondent to grant a cost-of-living adjustment to the unit employees in January 1981 was a unilateral change in their terms and conditions of employment and therefore a violation of Section 8(a)(5). I disagree.

The cost-of-living adjustments granted in the past had been effectuated pursuant to the series of collective-bargaining agreements between the parties which provided that adjustments were to be made on the basis of the Consumer Price Index of the preceding November 15. In this case the contract was terminated on November 1. Therefore, neither the date for determining an amount nor the date upon which the General Counsel contends the adjustment should have been effectuated was within the contractual period.[15] To state Respondent had an obligation to grant a cost-of-living adjustment in January 1981 is to write a contractual provision which the parties did not agree to the last time they were able to agree on a contract, 1977. The last one provided for in a contract was paid January 1980 pursuant to the CPI of November 15, 1979. Therefore, Respondent has not unlawfully failed to effectuate a wage increase provided for contractually.[16]

The General Counsel also contends that the parties had agreed on a cost-of-living adjustment for January 1981 because Respondent had initially stated that it was not proposing to eliminate the clause from the new contract. In so stating the General Counsel is arguing that Respondent should be compelled to implement its October 17 proposal on cost-of-living adjustments. This case is the converse of the case in which an employer implements a wage increase even though the parties have not reached agreement on an entire contract. Generally, if such action is done with the acquiescence of the union, or after an impasse had been reached, there is no violation. However, there is no legal compulsion for the employer to effectuate a proposed wage increase which is what the General Counsel seems to argue.

Therefore, Respondent's refusal to pay a January 1981 cost-of-living adjustment was not a unilateral action,[17] and not a violation of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operation of Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes, burdening and obstructing commerce and the free flow of commerce.

[15] Cf. *Meilman Food Industries, Inc.*, 234 NLRB 698 (1978).
[16] Cf. *Oak Cliff-Golman Baking Co.*, 202 NLRB 614 (1973).
[17] Assuming that it was an "action" at all, Respondent gave the Union ample opportunity to bargain about it, and the Union, by Porcaro, rejected the opportunity.

THE REMEDY

Having found that Respondent is engaged in unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent violated Section 8(a)(5) of the Act, I shall order Respondent, upon request, to meet with the Union and bargain collectively concerning rates of pay, wages, hours of employment, and other terms and conditions of employment of the employees in the unit found appropriate herein, and, if agreement is reached, embody it in a signed contract.

Having found that Respondent has discriminatorily refused to reinstate the unfair labor practice strikers upon the Union's unconditional application on their behalf to return to work, Respondent shall be required to offer them immediate and full reinstatement to their former positions or, if such positions are no longer in existence, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging if necessary any replacements. Further, Respondent shall be required to make them whole for any loss of pay they may have suffered as a result of the discrimination against them. Backpay shall be computed in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Having found that Respondent has violated and is violating Section 8(a)(3), (5), and (1) of the Act, I shall recommend that it be required to cease and desist therefrom and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights, guaranteed them under Section 7 of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit is appropriate for the purpose of collective bargaining:

> All employees employed by Struthers Wells Corporation at its Warren, Pennsylvania facility in the job classifications set forth in Exhibit "A" of the collective-bargaining agreement between Struthers Wells Corporation and the Union, effective from November 1, 1977, to November 1, 1980; excluding guards, professional employees and supervisors as defined in the Act, and all other employees.

4. At all times material herein the Union has been the exclusive collective-bargaining representative of the employees in the unit described in paragraph 3 of this section.

5. Respondent has, by its conduct in October and November 1980, refused and continues to refuse to bargain collectively in good faith concerning wages, hours of employment, or other terms and conditions of employment for the employees in the unit described above, in violation of Section 8(a)(5) of the Act.

6. The strike which was conducted on November 5 and 6, 1980, was an unfair labor practice strike.

7. By failing and refusing to reinstate unfair labor practice strikers upon their unconditional offer to return to work on and after November 7, Respondent has violated and is violating Section 8(a)(3) and (1) of the Act.

8. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

9. The General Counsel has proved no other allegations of the complaint.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:

ORDER[18]

The Respondent, Struthers Wells Corporation, Warren, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the Union as the exclusive representative of employees in the unit described above.

(b) Discouraging membership in Office and Professional Employees International Union, Local No. 186, AFL–CIO, or any other labor organization, by failing and refusing to reinstate unfair labor practice strikers upon their unconditional application to return to work.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Upon request, bargain in good faith with Office and Professional Employees International Union, Local No. 186, AFL–CIO, as the exclusive bargaining representative of the employees in the unit described above and, if an understanding is reached, embody such understanding in a written, signed contract.

(b) Offer to the following named employees immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, discharging if necessary any replacements, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay or other benefits suffered by reason of Respondent's failure to reinstate them upon their unconditional offer to return to work from an unfair labor practice strike in the manner described above in the section entitled "The Remedy": Barbara Daley, Jeri Bleeck, Martin Menio, and Kathy Thompson.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all

[18] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at Respondent's Warren, Pennsylvania, facilities copies of the attached notice marked "Appendix."[19] Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[19] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."